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IN THE

Supreme Court of the United States

1968

BIG RUN COAL & CLAY COMPANY, - - Petitioner,

VS:

NATIONAL LABOR RELATIONS BOARD, - Respondent.

PETITION FOR CERTIORARI

TO REVIEW A DECISION OF
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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GRABER PRINTING COMPANY, ASHLAND, KENTUCKY

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VS:

NATIONAL LABOR RELATIONS BOARD, - Respondent.

PETITION FOR CERTIORARI

To Review a Decision of
The United States Court of Appeals
For the Sixth Circuit

STATEMENT OF THE CASE

This case is before the Court on the Big Run Coal & Clay Company's Petition for Certiorari, pursuant to Rules 19 and 23, to review a decision of the United States Circuit Court of Appeals for the Sixth Circuit granting enforcement of an Order of the National Labor Relations Board, and a subsequent Order of that Court overruling the Respondent's Petition for Rehearing. These Orders of the Court are not reported; the Decision and Order of the Labor Board are reported at 152 NLRB No. 120. Copies of these Orders of the Court and Labor Board are appended to this Petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked are that the Circuit Court of Apeals has rendered a decision in conflict with the decision of another Circuit Court, and in conflict with applicable decisions of this Court.

The Opinion and Order of the Circuit Court of Appeals was entered November 13, 1967, a Petition for Rehearing was filed by Respondent and an Order overruling the Petition for Rehearing was entered February 8, 1968.

STATUTE CONFERRING JURISDICTION ON THE SUPREME COURT

Jurisdiction to review the judgment in question is believed to be conferred on the Supreme Court by 28 U. S. C. A. Section 1254, 62 Statutes 928, and Rule 19 of the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. WHETHER THE EMPLOYER SHOULD BE REQUIRED TO SIGN AN ALLEGED COLLECTIVE BARGAINING CONTRACT WHICH WAS INCOMPLETE IN FORM, OMITTED PROVISION FOR EXECUTION BY A CONTRACTING PARTY, AND WHICH WAS NEGOTIATED AT A TIME WHEN THE UNION'S REPRESENTATIVE KNEW THAT ALL THE EMPLOYEES IN THE BARGAINING UNIT HAD WITHDRAWN FROM THE UNION BUT CONCEALED THAT FACT FROM THE EMPLOYER'S REPRESENTATIVES.

2. WHETHER IN ANY EVENT, THE EMPLOYER SHOULD BE REQUIRED TO CONTINUE BARGAINING WITH THE UNION AFTER THE UNION HAD LOST ITS ENTIRE MEMBERSHIP IN THE PLANT, BY VOLUNTARY DEFECTION OF ALL THE EMPLOYEES WITHOUT FAULT OR PROCUREMENT BY THE EMPLOYER, THERE BEING NO CHARGE IN THE COMPLAINT OR PROOF OFFERED OF ANY FAULT OR PROCUREMENT BY THE EMPLOYER.

Concisely summarized, the essential facts are as follows: page references are to the printed copy of the record filed as an Appendix to the Labor Board's brief in the Circuit Cort and which is in the record of this Court.

The employer operates a small brick plant in Lexington, Kentucky, with 27 employees (General Counsel Exhibit 1-a, Appendix 50a). Following the Union's winning a representation election, the Union was certified as the bargaining agent and bargaining sessions commenced on July 27th, nine sessions being held between that date and November 4, 1963 (appendix 4a). Prior to the commencement of these meetings, Mr. Poske, International Representative of the National Union, wrote the Company on July 8, 1963 (General Counsel's Exhibit No. 9, Appendix 49a), stating that:

> "The Union further requests that employees of your Company who have been selected as wage committeemen and Local President be granted time off from their duties for the purpose of these negotiations."

At the first bargaining session Mr. Poske presented

a proposed form of contract as the basis for negotiations (General Counsel's Exhibit 2, Appendix 63a), in which the contracting parties were stated as follows:

> "ARTICLE I, AGREEMENT.
>
> This Agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL-CIO-CLS and Lexington Local No. 425 (hereinafter called the Union)."

The Committee from the Local Union, whose participation Mr. Poske had requested for the purpose of the negotiations, attended the first eight sessions with Mr. Poske (Appendix 4a). However, at the start of the ninth meeting, on November 4th, only Mr. Poske appeared. On inquiry as to the reason for the absence of all members of the Committee from the Local Union, he refused to explain their absence or to answer any questions with respect to them. (Appendix 45a). He later, at the hearing before the Labor Board's Hearing Officer, admitted that at that time he knew that all the employees had withdrawn from the Union and that he had no membership in the plant, and had been notified by them that they did not want him to bargain for them, (appendix 46a).

During the adjournment for lunch, the employer's representative obtained information that an officer of the Local Union had, shortly before the meeting, made the statement that all the employees had withdrawn from the Union. On reconvening the meeting after lunch, when Poske was advised of this situation he again refused to answer any questions or either to confirm or deny this rumored loss of membership, (General Counsel Exhibit 4, Appendix 65a).

This action by Poske placed the employer's representative in the position of being obligated to continue bargaining with Poske if in fact he still had a majority of the employees in the unit as members of the Union, but of being relieved of any duty to bargain further with him if, without the Company's fault, the Union had in fact lost its majority in the plant, and especially if the entire membership had defected.

Also, being unable under the law to interrogate any of the employees as to their then membership or non-membership, the Company, to avoid a possible Unfair Labor Practice by refusing to bargain further if Porke was actually entitled to bargain, accepted his demand to that effect, (General Counsel Exhibit, Appendix 65a). As both Poske, the Company's attorney, and the Federal Conciliator present, all lived at considerable distances from Lexington, where the meetings were being held, the Company representatives agreed to bargain further, making the reservation that any form of contract negotiated must be later approved by the Local Unian, which was designated in the Union's proposal as one of the three contracting parties (43a).

The National Union's Representative, Mr. Poske, as shown above, had procured the Company to give the Local Union Committee time off "for the purpose of these negotiations" and had conducted the negotiations on the basis of a three-party form of contract proposed by him. The Company President, Mr. Coleman, testified (Appendix 39a) that in the meetings prior to November 4th "we had been negotiating with them" and Mr. Poske himself testified, on direct examination of Board counsel, (Appendix 43a) as follows:

"Q. Are you the same Mr. Poske referred to earlier in these proceedings as having participated in

the negotiating committee with the Big Run Coal and Clay Company?

A. Yes, sir."

Further, on cross-examination, being asked whether he ever informed the Company representative that the Local Committee was not authorized to negotiate, Mr. Poske presented the eleventh-hour alibi that (Appendix 47a):

"This matter never came up. I came to the table with certain people, and as I said before, they were there as a matter of public relations as far as the Local was concerned, and also there to lend their assistance, but I was there as the sole negotiator for the Union."

ARGUMENT

THE EMPLOYER WAS ENTITLED TO REQUIRE EXECUTION OF THE CONTRACT BY ALL CONTRACTING PARTIES.

The Union first made the Local a party to the contract proposed by it, procured the Company Representatives to negotiate jointly with himself and the Local's Committee on that basis for the first eight bargaining sessions and repudiated his previously accepted proposal at the final meeting of November 4th only after being notified that the membership had defected.

The question of good faith bargaining with respect to matters which the Act does not make mandatory subjects of bargaining was fully considered by this Court in *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 365 U. S. 342, 2 L. Ed. 2nd 823, where an employer proposed a form of contract which required a pre-strike vote of the employees by secret ballot to which the Union representatives refused to agree. In the absence of such agreement, the employer's insist-

ence constituted refusal to bargain in good faith. However, the Court's opinion further stated (350) that:

> "We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects which are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the Union."

There is no question that a Union may voluntarily elect to make the Local Union a contracting party jointly with the National Union certified as the bargaining agent, or even to make the Local Union the sole contracting party with the employer. The records of this Court contain a multitude of cases in which this was done. If either the employer or the National Union propose such a form of contract and the other party agrees to that proposal, that agreement is binding.

Section 8 (d) of the Act imposes on employers and labor organizations the duty to execute a "written contract incorporating any agreement reached if requested by either party." The statute does not differentiate between "substantive" terms of a contract or other terms which are essential to a complete contract, nor does it define what constitutes a "substantive" term. On its face, the statute contemplates a complete "agreement" before an obligation to reduce the agreement to writing is imposed.

It is elemental that the designation of the contracting parties is essential to complete agreement on a contract.

In the original leading decision on the duty of the

parties to reduce an agreement to writing, *Heinz* v. *N. L. R. B.*, 311 U. S. 515, 85 L. Ed. 309 (in which counsel for Petitioner here was of counsel), there was no dispute as to who would constitute the parties to the agreement. Also, as stated in the opinion (516), the Board's order sought to be enforced required the employer, among other things,

> "to recognize and bargain collectively with the Canning and Pickle Workers Local, Union No. 325 a labor organization affiliated with the American Federation of Labor."

Likewise, in the other cases cited by Board Counsel in the Circuit Court, *Standard Oil Co.* v. *N. L. R. B.*, 322 Fed. 2nd 40, 45 CA 6); *N. L. R. B.* v. *Waite, Inc.*, 310 Fed. 2nd 700, (CA 6); *N. L. R. B.* v. *Todd Co.*, 173 Fed. 2nd 705, 707, (CA 2), cert. den. 330 U. S. 864; and *Lonzano Enterprises* v. *N. L. R. B.*, 327 F. 2nd 814, 818-819 (CA 9), so far as those opinions disclose there was no disagreement as to any provisions of the agreement, including who were the contracting parties. Here, the Union's representative, Poske, himself at the outset specified who were the contracting parties with whom the Company was asked to negotiate. He presented to the Company representatives at their first meeting, a draft of a proposed contract (General Counsel Exhibit 2, (27), in which he specified that,

> "This agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky, plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL-CIO-CLC and Lexington Local No. 425, (hereinafter called the Union)."

His draft also contained no signature page and hence there was no intimation during the bargaining sessions that the negotiations were on any other basis than as proposed by him.

It is the position of the Petitioner that the Union's proposal to make the Local Union a party to the three-party contract offered by it had in good faith been accepted by the employer and that under these circumstances the employer was entitled to the enforcement of that agreement.

The opinion of the Sixth Circuit in the present case relies wholly on their previous recent opinion in *Houchens Market* v. *N. L. R. B.*, C. A. 6, 1967, 375 Fed. 2nd 208. Actually, the facts in that case do not sustain the Court's ruling here, but to the contrary, support the Petitioner's position. In the *Houchens* case, after four months of bargaining, the Company attorney presented the Union a proposed form of contract between the Company and the International Union only, electing not to include the Local Union. After the Union had accepted this proposal, the Company attorney later attempted to repudiate his proposal and require ratification by the Local Union.

Under these circumstances, the Court refused to allow the Company to repudiate its own proposal which had been accepted by the Union. However, the opinion further noted that, while not a subject of mandatory bargaining, such a proposal would be legal and, if accepted, would be binding, citing *N. L. R. B.* v. *Borg-Warner*, 356 U. S. 342 (349).

THERE WAS NO OBLIGATION IN ANY EVENT ON THE EMPLOYER TO BARGAIN WITH MR. POSKE AFTER ITS EMPLOYEES HAD WITHDRAWN FROM THE UNION.

While this is the really substantial issue in this case, and which was presented by the pleadings and argued at length by counsel for both parties in the Circuit

Court, that Court, as is shown by its Opinion, for some reason refused to pass on the issue so raised and which was material to the employer's defense.

In the Trial Examiner's Report and Recommendations, which were adopted by the Board on review, he on this issue cited *Brooks* v. *N. L. R. B.*, 348 U. S. 96, 99 L. Ed. 125 (1954); *N. L. R. B.* v. *Henry Heide, Inc.*, 219 Fed. 2nd 46, 47-48. (CA 2), Cert. denied, 348 U. S. 952; and *N. L. R. B.* v. *Wooster Davision of Barg-Warner Corp.*, 356 U. S. 242, above discussed.

These cases are readily distinguishable from the case here before the Court. In the *Heide* case the Board found as a fact that the employer never at any time bargained with the Union in good faith, but was dealing with a rival Union and simply "stalling" until the year ran out, to gain time to determine the certified Union.

In *Brooks* v. *N. L. R. B.*, supra, decided in 1954, the employer had refused to bargain with the certified Union at the time the certification was issued and at all times thereafter. He never at any time bargained with the Union, in good faith or at all.

Subsequently, in *N. L. R. B.* v. *Florida Citrus Canners Co-op*, (CA 5), 228 Fed. 2nd 630 (1961) a case where, as here, there had been a number of good faith bargaining sessions; in that case the Board found that after certification of the Union on February 7th, the employer refused to bargain further on December 18th, nearly two months short of one year after certification. The Circuit Court's opinion states that,

> "We are convinced that it was not intended by the Congress that employees should be required to accede to a representation which they have re-

pudiated, in this case, by more than three-fourths of the bargaining unit. It might be said here, as this court has before said:

'If we should compel respondent to bargain further with this union, which the employees themselves have obviously repudiated, the result would be to deny them the right, secured by the Act, to bargain through the representative of their choice.' N. L. R. B. v. Mayer, 5th Cir. 1952, 196 F. 2d 286 (21 LC Par. 66,931).

We do not think the rule requires an employer to bargain with a union which has demonstrably lost its majority and where the filing of a petition for decertification would be futile. N. L. R. B. v. Swan-Hosier Mills, 5th Cir. 1952, 195 F. 2d 350 (21 LC Par. 66,878), Cert. den. 344 U. S. 863, 73 S. Ct. 103, 97 L. Ed. 699."

The Supreme Court later (7 L. Ed. 2nd 829, 269 U. S. 304) reversed the Circuit Court's additional ruling on the separate question of the weight of the evidence necessary to sustain a Board Order for reinstatement with back pay. The Supreme Court's opinion did not discuss, and left in effect, the Circuit Court's holding that the employer was not required to bargain further with the Union.

The present decision of the Sixth Circuit is also inconsistent with their own recent holding in *Philip Cary Mfg. Co.* v. *N. L. R. B.*, 331 Fed. 2nd 720, 49 L.C. 8,885. In the Cary case, as here, the parties conducted eleven bargaining sessions over a period of several months following the certification. In that case the Union then struck the plant and later, after notice, the employers brought in new employees replacing a number of the strikers. The Court later held that the employer was guilty of an unfair labor practice in refus-

ing to reinstate certain of the strikers and required their reinstatement with back pay.

Nevertheless, on the question of the employer's duty to bargain further, the Court refused to enforce the Board's order. After pointing out that the Union had won the election by the bare majority of 122 to 112, the Court held:

> "In the light of the large number of strikers who were permanently replaced, there would be substantial ground for doubt concerning the Union's majority status. (Citing cases).
>
> Since the Company had well-founded doubts about the Union's majority status, it would have been refused to bargain at the expiration of one year after the Union's certification. Brooks v. N. L. R. B., 27 LC 68,835, 348 U. S. 96 . . . (Citing additional cases).
>
> This assumes, as was true in this case, that the Company did not commit an unfair labor practice which was responsible for the Union's loss of majority. N. L. R. B. v. Superior Fireproof Door & Sash Co., 289 Fed. 2nd 713; N. L. R. B. v. Florida Citrus Canners Co-operative, 288 Fed. 2nd 630, 638, rev. and reman., 369 U. S. 404, initial decision aff'd, 311 Fed. 2nd 541."

After noting that the General Counsel was contending that the Company's failure to continue bargaining during the last two and one-half months of the certification year was an unfair labor practice, the Court further held that:

> "That Board's order, under the facts of this case, overlooks two practical and important facts. First, with the withdrawal of its super-seniority proposal on August 10, 1961, the Company resumed good faith, bargaining, meeting twice with the Union, without result, before the hearing in this

case began on October 3, 1961. Secondly, we are faced with the Union's obvious loss of its majority status. A realistic view of the situation demonstrates the futility of requiring the Company to continue negotiations with this Union, Perry Coal Co. v. N. L. R. B. (42 LC, 16,981), 291 F. 2d 126, 128 (C.A. 7); N. L. R. B. v. Florida Citrus Canners Co-operative, supra, unless and until the Union has been duly certified as bargaining representative following a new election, N. L. R. B. v. Superior Fireproof Door & Sash Co., supra.

It is appropriate to note here a statement by Judge Friendly in the *Superior Fireproof Door* case:

> "Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself. (42 LC, 16,857) 289 F. 2d at 724. In view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status, we hold that the Company is no longer required to bargain with this Union. This part of the order of the Board is set aside and enforcement of the Board's order in this respect is denied."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Certiorari be granted and that the decision of the Circuit Court of Appeals be reviewed on its merits.

ROBERT T. CALDWELL
LOWELL T. HUGHES
Counsel for Petitioner

APPENDIX (A)

NATIONAL LABOR RELATIONS BOARD

In the Matter of: Big Run Coal & Clay Company
Case No. 9-CA-3225

DECISION AND ORDER

On March 12, 1965, Trial Examiner Herbert Silberman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respoindent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recom-

mended Order of the Trial Examiner, and orders that Respondent, Big Run Coal & Clay Company, Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., June 4, 1965.

John H. Fanning Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member

(Seal) National Labor Relations Board

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge filed on June 16, 1964, by United Glass and Ceramic Workers of North America, AFL-CIO, herein called the Glass Workers, a complaint dated July 24, 1964, was duly issued alleging that the Respondent, Big Run Coal & Clay Company, herein called the Company, has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a) (1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent's answer to the complaint denies that it has engaged in the alleged unfair labor practices. A hearing in this proceeding was held before the undersigned at Lexington, Kentucky, on October 21, 1964. Thereafter, briefs were duly filed by General Counsel and by Respondent.

Upon the entire record in this case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Company

Respondent, a Kentucky corporation, is engaged in the manufacture of bricks at its plant located in Lexington, Kentucky. During the past year, which period is representative of Respondent's operations, in the course and conduct of its business, Respondent sold and shipped from its Lexington, Kentucky, plant goods and products, valued at in excess of $50,000, to places outside the State of Kentucky. Respondent admits, and I find, that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

The Glass Workers is a labor organization as defined in Section 2(5) of the Act.

III. The unfair labor practices

Following an election conducted by the Board,[1] on June 27, 1963, the Glass Workers was certified as the exclusive collective-bargaining representative of employees of the Company in the following described unit:

> All production and maintenance employees of the Employer, at its plant on Stone Road in Lexington, Kentucky, excluding all office clerical employees and all guards, professional employees and supervisors as defined in the Act.

---

1. Case No. 9-RC-5438.

On July 8, 1963, William H. Poske, Jr., international representative of the Glass Workers, wrote to C. A. Coleman, president of the Company, requesting a meeting for the purpose of beginning collective-bargaining negotiations. The letter included the following request:

> The Union further requests that employees of your Company who have been selected as wage committeemen and Local President be granted time off from their duties for the purpose of these negotiations.

The Local referred to in the Glass Workers' letter is Lexington Local No. 425, a duly organized affiliate of the Union, whose membership is limited to employees of the Company.

There were nine bargaining sessions between the Glass Workers and the Company, the first having been held on July 27, 1963, and the last on November 4, 1963. Poske attended all nine sessions. In addition, three representatives of Local 425 attended the first eight sessions. Porke described the Local's representatives, one of whom was its president, as the wage committee. Poske explained the function and authority of the wage committee to be as follows: "they were authorized (as a bargaining committee) from the Local Union's standpoint, but they were not a member of the negotiating committee, as such. I was there as the sole bargaining agent, I had this committee there with me, which we have in other negotiations for the purpose of becoming acquainted with union activities, for the purpose of public relations and for whatever information that they could give to me that I needed to bargain with. And as for them being a part of the negotiating committee I would say no." Poske further testified, also without contradiction, that there was no discussion with the Company representatives concerning the authority of the wage committee.

At the first bargaining session the Glass Workers submitted to the Company a draft of a proposed contract. The preamble to Article I of this agreement reads as follows:

> This Agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL-CIO-CLC and Lexington Local No. 425 (hereinafter called the Union).

The identical preamble appears in all subsequent drafts of the proposed contract between the Company and the Glass Workers, including the draft which was mailed to the Company by the Glass Workers on December 31, 1963.

On November 4, 1963, the date of the last bargaining session, Poske appeared alone. Although asked, Poske declined to explain the absence of the wage committee and advised the Company representatives that he was present "as the sole bargaining agent and was prepared to consummate an agreement." Poske testified that the Company representatives were willing to continue negotiations in the absence of the wage committee but both Mr. Coleman and Mr. Caldwell (the Company's attorney) made it very plain that any understandings reached would have to be ratified by the membership of Local 425 before the Company would sign the contract. Although Poske did not agree to this condition, the parties continued their negotiations and arrived at an understanding regarding all the substantive terms of a collective-bargaining agreement. The terms of the agreement reached between Poske and the Company representatives on November 4 were modified in a minor respect on November 6 during a telephone conversation between Poske and Caldwell.

Concerning the reason for the absence of the wage

committee from the November 4 bargaining session, Poske testified: "Prior to the negotiating session on November 4th, I had received correspondence from various members of the Local Union stating and setting forth that they no longer wanted to have a Union and no longer wanted me to bargain for them . . ."

On November 5, 1963, attorney Caldwell mailed to Poske a draft of a contract reflecting the agreements reached at the November 4 meeting. In his letter of transmittal Caldwell advised that "it was and is the Company's position that we should not enter into a contract covering the employees of our plant, who compose the certified bargaining unit, without their knowledge and approval. This is especially advisable in view of the reports now coming to us indicating that a majority of the employees may have withdrawn from the Union and that, at this time, you may not actually have a majority of the bargaining unit. Under these circumstances, the Management is willing to execute the contract provided it has been presented to the membership of the bargaining unit and approved by them."

On December 31, 1963, Poske mailed to the Company a revised draft of the agreement, which was received January 2, 1964. This contract conforms in all respects with the earlier draft prepared by Caldwell except only for the inclusion of the change which was agreed to on November 6 and except that the signature page does not call for execution by Local 425 whereas the draft submitted by Caldwell calls for the signatures of the president and secretary of Lexington Local No. 425. Article XX of the contract, which relates to the term of the agreement, does not show the date on which the agreement becomes effective nor the date of its expiration, although it contains a conventional 60-days automatic renewal provision. However, at the hearing, the parties stipulated that the understanding between the Company and the Glass Workers was that the agreement was to be effective for a period of 1 year from the date of its execution. Therefore,

giving effect to this understanding, the draft prepared by the Glass Workers represents a complete contract embodying all the agreements reached between the Company and the Glass Workers. The copies of the contract mailed to the Company on December 31, had been executed by the Glass Workers and Poske's letter of transmittal requested the Company to sign and return three copies of the instrument.

On January 7, 1964, attorney Caldwell wrote to Poske reaffirming the Company's position as expressed in his letter of November 5, 1963, and returning the contracts unsigned. C. A. Coleman, president of the Company, testified that the absence of ratification by its employees and the absence of any signature by Local No. 425 were the only reasons that the Company refused to sign the agreement.

The factors relied upon by the Company furnish no lawful justification for its refusal to execute the contract mailed to it on December 31, 1963. (Said draft of agreement is hereinafter referred to as the "Contract.") The Act imposes upon an employer the duty to bargain collectively with the duly designated representative of his employees and, if requested, to execute a written contract incorporating the terms of any agreement reached.[2] Absent unusual circumstances, where the designation of representatives was evidenced by the results of an election conducted by the Board, this duty to bargain continues for at least 1 year from the date of the Board's certification notwithstanding any loss of majority by the union during such year.[3] Furthermore, loss of a majority does not modify or qualify the collective bargaining obligations of an employer during the certification year: it neither

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2. Section 8(d). See *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514.

3. *Roy Brooks* v. *N.L.R.B.*, 348 U.S. 96.

excuses an employer from executing a written contract, if an agreement was reached with the union during the certification year,[4] nor permits him to impose as a condition to its execution that the terms of the agreement shall first be approved by the membership of the bargaining unit.[5] Accordingly, the Glass Workers purported loss of majority was not a legally sufficient reason for the Respondent's refusal to sign the Contract when it was received on January 2, 1964, less than 1 year after the Glass Workers' certification, or for its insistence upon ratification of the Contract by its employees as a prerequisite to its execution by the Company.

Respondent also contends that "the basis of negotiations was Mr. Poske's own formal proposal which, by its express terms set out in Article I, included the Local Union as one of the three contracting parties" and, therefore, without the concurrence of Local 425 no agreement was reached among all the parties to the negotiations. By insisting that Local 425 was a necessary party to the Contract, Respondent in effect takes the position that Local 425 had acquired a representative status equal to that of the Glass Workers and that a joint bargaining representative had been substituted for the certified representative. I find no merit to this argument. Although "[t]he Act does not prohibit the voluntary addition of a party"[6] to a collective-bargaining agreement between an employer and the certified representatice of his employees, the record in this case

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4. *Holly-General Company, Division of Siegler Corporation,* 129 NLRB 1098.

5. "The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf." *North Country Motors, Ltd.,* 146 NLRB No. 82.

6. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 350.

does not support Respondent's assertion that the Company an the Glass Workers had agreed to add Local 425 as a party to their Contract.[7] The subject was not discussed during the negotiations. According to the uncontradicted testimony of Poske, the representatives of Local 425 attended the bargaining sessions merely in the capacity of observers and consultants and had no authority as negotiators. Furthermore, at the November 4 meeting, Poske specifically informed the Company representatives that he was acting "as the sole bargaining agent." Thus, any misapprehension on the part of the Respondent as to the status the Glass Workers was claiming for Local 425 was effectively dispelled before the conclusion of the negotiations. In the circumstances, despite the preamble to Article I of the various drafts of contract prepared in the course of the negotiations, the Company could not fairly have assumed (and no testimony was offered on behalf of the Respondent that its representatives had made any such assumption) that the Glass Workers was proposing, and was bargaining on the basis, that Local 425 would be included as a necessary party to their agreement and that the approval of Local 425 would be required as a condition to the successful conclusion of negotiations. A similar issue was decided by the Board in *The Standard Oil Company* case.[8] In that case the Board held that the certified bargaining agent alone was entitled to statutory representative status despite a series of collective-bargaining agreements, entered into subsequent to the date of certification, which had

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7. In view of my findings it is unnecessary to consider whether a certified representative may unilaterally repudiate an agreement with the employer to add an affiliated union as a party to any agreement they might negotiate.

8. 92 NLRB 227, 235-236, remanded on other grounds, *N.L.R.B.* v. *Standard Oil Co.*, 196 F. 2d 892 (C.A. 6).

been jointly executed by both the local and international.[9]

Accordingly, I find that the Respondent, by refusing on and after January 2, 1964, to execute the Contract embodying the rates of pay, wages, hours of employment, and other conditions of employment, as theretofore agreed upon, failed to bargain collectively, as required by Section 8(d) of the Act, with the Glass Workers as the exclusive representative of its employees in the appropriate unit, and thereby violated Section 8(a)(5) and (1(of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations, described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices it will be recommended that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

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9. See also *Eastern Massachusetts Street Railway Company*, 110 NLRB 1963, enfd., 235 F. 2d 700 (C.A. 1); and *Kit Manufacturing Company, Inc.*, 150 NLRB No. 62. Mr. Justice Harlan in his dissenting opinion in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 362, observed, "By conditioning agreement upon a change in signatory from the certified exclusive bargaining representative, the company here in effect violated this duty [to execute a written contract incorporating any agreement reached if requested]."

I have found that the Company and the Glass Workers reached an agreement with respect to the terms and conditions of employment for the employees in the unit represented by Glass Workers, and that the Company has failed in its statutory duty to bargain collectively with said Union, by refusing, during the year following the date of the Union's certification, to execute the written contract incorporating the terms of their agreement. Although more than 1 year now has elapsed since the date of the Glass Workers' certification and the Union may no longer represent a majority, "[i]t would do violence to the Act [and] . . . would encourage purposeful delay"[10] if, for such reasons alone, the Respondent should be exeused from the obligation to bargain collectively with the Glass Workers and thereby would be absolved from the consequences of its unfair labor practices.[11] (([A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."[12] Respondent's failure to implement the agreement it reached with the Glass Workers by its unlawful refusal to execute the contract prevented the achievement of any measure of practical success in its bargaining relationships with that Union. Accordingly, it is necessary, in order to effectuate the purposes of the Act, to recommend an order requiring the Company to take such appropriate remedial action as will promote the accomplishment of this objective.

The contract mailed by the Union to the Respondent on December 31, 1963, a copy of which was received in evidence as an exhibit in this case and was marked

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10. *N.L.R.B.* v. *Warrensburg Board & Paper Corporation,* 58 LRRM 2145 (C.A. 2).

11. *N.L.R.B.* v. *Katz,* 369 U.S. 736, 748, ftn. 16.

12. *Frank Bros. Company* v. *N.L.R.B.*, 321 U.S. 702, 705.

"G.C. Exhibit 7," correctly reflects the agreement between the Company and the Glass Workers. Said Contract, in accordance with the agreement of the Company and the Glass Workers, was to be effective for an initial term of 1 year from the date of its execution subject to automatic renewal for additional periods of 1 year unless notice to terminate or modify the agreement shall have been given by either party to the other 60 days prior to any anniversary date. Consistent with Board precedent, I shall recommend that, upon request of the Union, the Respondent sign the contract and deliver an executed copy thereof to the Union, and that said Contract shall be retroactively effective to January 2, 1964, the date when a completed draft thereof was received by Respondent for its signature, and prospectively effective from that date to at least the next renewal date, to wit, January 2, 1966.[13] Due to the lapse of time, the Glass Workers may, however, desire to bargain for a new agreement immediately rather than bebound by the terms of an agreement reached in 1963. Accordingly, I shall recommend that if no request to sign the Contract is made by the Glass Workers the Respondent, upon request of said Union, shall bargain collectively with it as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to fully remedy the violations of the Act committed herein, I shall also recommend that, if the Respondent is requested by the Glass Workers to execute the Contract, the Respondent shall make the employees whole for any losses they may have suffered by reason of Respondent's unlawful refusal to execute the Contract. A failure to provide for the foregoing, retroactive to January 2, 1964, would enable the Respondent to benefit from its own unfair labor prac-

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13. *Ogle Protection Service, Inc.*, 149 NLRB No. 50.

tices. Any backpay which shall be due to employees pursuant hereto shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and shall bear interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. By failing and refusing, since January 2, 1964, to execut the written Contract embodying the terms of the agreement reached by the Respondent and the Glass Workers with respect to wages, hours of employment and other conditions of employment for employees in the appropriate bargaining unit described below, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act. The appropriate collective bargaining unit is composed of all production and maintenance employees of the Respondent, at its plant on Stone Road in Lexington, Kentucky, excluding all office clerical employees and all guards, professional employees and supervisors as defined in the Act.

2. By the foregoing conduct Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, and pursuant

to Section 10(c) of the Act, I hereby recommend that Respondent, Big Run Coal & Clay Company, its officers, agents(successors and assigns, shall:

1. Cease and desist from:

(a) Refusing, if requested to do so by the Glass Workers, to sign the Contract reached with that Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to bargain collectively through representatives of their choosing.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request of the Glass Workers, forthwith execute the Contract described in the section of this Decision entitled "The remedy" and deliver an executed copy thereof to the Glass Workers. Said Contract, subject to its automatic renewal clause, shall be effective from January 2, 1964, until January 2, 1966. However, if no request to execute the Contract is made, upon request of the Glass Workers, bargain collectively with it as the exclusion(?) representative of employees in the unit described above, and, if an agreement is reached, execute a written contract incorporating the terms of such agreement.

(b) Upon request of the Glass Workers that the aforesaid Contract be executed, give effect, retroactive to January 2, 1964, to the terms of said Contract, including but not limited to the provisions relating to wages and other benefits, and make whole the employees, in the manner set forth in the section of this Decision entitled "The remedy," for any losses suffered by them by reason of Respondent's refusal to execute the Contract.

(c) Post at its plant in Lexington, Kentucky, the notice attached hereto and marked "Appendix."[14] Copies of said notice to be furnished by the Regional Director for the Ninth Region, shall, after being signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director in writing, within 20 days from the date of the receipt of this Decision what steps Respondent has taken to comply herewith.[15]

Dated at Washington, D. C., March 12, 1965.

/s/ Herbert Silberman
Trial Examiner

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14. In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

15. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

FILED
NOV 13 1967
CARL W. REUSS, Clerk

APPENDIX (B)

No. 17,149

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
vs.	)	ORDER
BIG RUN COAL & CLAY CO., Respondent.	)	

Before: EDWARDS, Circuit Judge, MCALLISTER, Senior Circuit Judge, KENT*, District Judge.

This is a petition for enforcement of an order of the National Labor Relations Board requiring the respondent to execute a contract with United Glass and Ceramic Workers of North America, AFL-CIO-CLC and Lexington Local No. 425. The company resisted the execution of the contract without a ratification by the members of the local union involved.

This case is controlled by the decision of this Court in *Houchens Market* v. *National Labor Relations Board,* C.A. 6, 1967, 375 F. 2d 208, and the cases therein cited.

It is ORDERED that enforcement of the order of the National Labor Relations Board be, and it is hereby granted.

ENTERED BY ORDER OF THE COURT
CARL W. REUSS
Clerk

(*) Honorable W. Wallace Kent, Chief Judge, United States District Court, Western District of Michigan, sitting by designation.

FILED
FEB 8 - 1968
CARL W. REUSS, Clerk

APPENDIX (C)
No. 17,149

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
vs.	)	ORDER
BIG RUN COAL & CLAY CO., Respondent.	)	

Before: EDWARDS, Circuit Judge, MCALLISTER, Senior Circuit Judge, and KENT, District Judge.*

Upon consideration, it is ORDERED that the petition for rehearing, filed by respondent in the above captioned case be, and hereby is, denied.

Entered by order of the Court
CARL W. REUSS
Clerk

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* Honorable W. Wallace Kent, Chief Judge, United States District Court for the Western District of Michigan, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1412

BIG RUN COAL & CLAY COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 30) is reported at 385 F. 2d 788. The Board's decision and order (Pet. App. 15–29) are reported at 152 NLRB 1144.

JURISDICTION

The order of the court of appeals was entered on November 13, 1967, and a petition for rehearing was denied on February 8, 1968 (Pet. App. 31). The petition for a writ of certiorari was filed on May 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

308-913—68

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board correctly held that the company violated Sections 8(a) (5) and (1) of the National Labor Relations Act by refusing to execute a written contract embodying the terms of an agreement which it had reached with the employees' statutory bargaining representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, p. 10.

STATEMENT

1. On June 27, 1963,[1] following a Board-conducted election, the United Glass and Ceramic Workers of North America, AFL–CIO ("the Union"), was certified as the collective bargaining representative of the Company's production and maintenance employees (Pet. App. 17; B.A. 3a, 69a).[2] On July 8, William H. Poske, Jr., a Union representative, wrote to the Company requesting a collective bargaining meeting, and also requesting that the wage committeemen and the president of the local affiliate of the Union[3] be allowed time off to attend the negotiations (Pet. App. 18; B.A. 4a, 69a–70a).

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[1] All dates are in 1963 unless otherwise stated.

[2] "B.A." refers to the Board's Appendix filed in the court below.

[3] The Local referred to is Lexington Local No. 425, a duly organized affiliate of the Union, whose membership is limited to employees of the Company (Pet. App. 18; B.A. 4a).

At the first bargaining session on July 27, Poske submitted a draft of a contract which stated in its preamble (Pet. App. 19; B.A. 4a–5a, 31a, 63a):

> This agreement is between Big Run Coal & Clay Company for its Lexington, Kentucky, plant (hereinafter called the Company) and the United Glass and Ceramic Workers of North America, AFL–CIO–CLC and Lexington Local No. 425 (hereinafter called the Union).

This preamble appeared in all subsequent drafts of the contract, including the final draft which was mailed to the Company on December 31 (Pet. App. 19; B.A. 5a, 67a).

At the first eight of the nine bargaining sessions, Poske was accompanied by three representatives of the Local (Pet. App. 18; B.A. 4a, 44a–45a). Poske testified that the representatives of the Local were not bargaining agents for the Union (Pet. App. 18; B.A. 4a, 47a):

> I was there as the sole bargaining agent, I had this committee there with me, which we have in other negotiations for the purpose of becoming acquainted with union activities, for the purpose of public relations and for whatever information that they could give to me that I needed to bargain with. As for them being a part of the negotiating committee I would say no.

At no time was there any discussion between the Union and the Company negotiators concerning the negotiating authority of the Local representatives (Pet. App. 18; B.A. 4a, 47a).

Poske attended the last bargaining session on November 4 without the Local representatives, and advised the Company that he was "the sole bargaining agent and was prepared to consummate an agreement" (Pet. App. 19; B.A. 5a, 45a). The Company agreed to continue negotiations in the absence of the Local representatives, but Company President Coleman and Robert T. Caldwell, the Company's attorney, stated that any agreement reached by the parties would have to be ratified by the membership of the Local before the Company would sign the contract (Pet. App. 19; B.A. 5a, 43a–44a). Although Poske did not agree to this condition, the parties continued their negotiations and arrived at an understanding as to all the substantive terms of a collective bargaining agreement (Pet. App. 19; B.A. 5a, 28a–29a, 44a).[4]

On November 5, Caldwell mailed Poske a draft contract reflecting the agreement reached at the November 4 meeting (Pet. App. 20; B.A. 6a, 64a–66a). In his letter of transmittal, Caldwell stated (Pet. App. 20; B.A. 6a, 65a–66a):

> * * * [I]t was and is the Company's position that we should not enter into a contract covering the employees of our plant, who compose the certified bargaining unit, without their knowledge and approval. This is especially advisable in view of the reports now coming to us indicating that a majority of the employees may have withdrawn from the Union and that, at this time, you may not actually have a ma-

[4] Company President Coleman conceded that "[a]ll the substantive provisions of the collective bargaining agreement were reached by the parties on November 4" (B.A. 29a).

> jority of the bargaining unit. Under these circumstances, the Management is willing to execute the contract provided it has been presented to the membership of the bargaining unit and approved by them.

The Company's draft called for execution by the president and secretary of the Local in addition to the representatives of the Union (Pet. App. 20; B.A. 6a).

The Union prepared and executed a revised draft of the contract, and sent it to the Company for its signature on December 31 (Pet. App. 20; B.A. 6a, 66a–67a).[5] The signature page did not provide for execution by representatives of the Local (*ibid.*).[6] On January 7, 1964, Caldwell wrote to Poske, reaffirming the Company's position expressed in his letter of November 5, and returning the contract unsigned (Pet. App. 21; B.A. 7a, 68a–69a). President Coleman testified that the lack of ratification by the employees and the absence of any signature by the Local were the only reasons for the Company's refusal to sign the contract (Pet. App. 21; B.A. 7a, 38a).

2. The Board found that the contract mailed by the Union on December 31 embodied all understandings between the parties on the terms of a complete collective bargaining agreement, and that the Union, which was the certified bargaining representative, had not

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[5] The terms of the agreement had been modified in a minor respect during a telephone conversation between Poske and Caldwell on November 6 (Pet. App. 19; B.A. 5a, 29a).

[6] Although the contract did not specify the dates of its effectiveness or expiration, the parties stipulated that they had agreed that it was to be effective for a period of one year from the date of execution (Pet. App. 20; B.A. 6a–7a, 41a–42a).

agreed to add the Local as a party to the contract (Pet. App. 22–23). The Board held, moreover, that the Company's insistence on employee ratification could not be justified by its reliance on reports that the Union had lost employee support, because, since the Union's certification was less than one year old, its majority status could not be challenged in that manner (Pet. App. 21–22). Accordingly, the Board held that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to execute the written contract as required by Section 8(d) (Pet. App. 24, 27). The Board ordered the Company to execute the contract and to give it retroactive effect (Pet. App. 28–29). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 30).

ARGUMENT

Petitioner's primary contention is that it had no duty to execute a contract which made no provision for signature by the Local because the Union had proposed, in the preamble to its draft, that the Local would become a party to the contract and the Company had accepted that provision (Pet. 6–9). Since the Union alone was the certified representative, however, the Company could not, over the Union's objection, condition the execution of an agreement upon the addition of the Local or upon obtaining employee ratification. See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342. And the Board found (Pet. App. 22–23) that the Union had not agreed to make the Local a party to the contract. The only issue presented, therefore,

is whether substantial evidence supports that finding. This is not an issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491. In all events, there is ample evidentiary support for the Board's finding.[7] Compare *Houchens Market of Elizabethtown, Inc.* v. *National Labor Relations Board,* 375 F. 2d 208, 210–211 (C.A. 6).

Contrary to petitioner's additional contention (Pet. 9–13) it was not relieved of its duty to bargan with the Union, including the duty to execute a written contract, because it had received reports "indicating that a majority of the employees may have withdrawn from the Union" (B.A. 65a). As this Court has held, an employer must ordinarily bargain with the certified

[7] The Board found (Pet. App. 23):

> * * * According to the uncontradicted testimony of Poske, the representatives of Local 425 attended the bargaining sessions merely in the capacity of observers and consultants and had no authority as negotiators. Furthermore, at the November 4 meeting, Poske specifically informed the Company representatives that he was acting "as the sole bargaining agent." Thus, any misapprehension on the part of the Respondent as to the status the Glass Workers were claiming for Local 425 was effectively dispelled before the conclusion of the negotiations. In the circumstances, despite the preamble to Article I of the various drafts of contract prepared in the course of the negotiations, the Company could not fairly have assumed (and no testimony was offered on behalf of the Respondent that its representatives had made any such assumption) that the Glass Workers was proposing, and was bargaining on the basis, that Local 425 would be included as a necessary party to their agreement and that the approval of Local 425 would be required as a condition to the successful conclusion of negotiations. * * *

representative for a period of one year from the date of the Board's certification, notwithstanding evidence of an intervening loss of majority support. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96. Since the Union was certified on June 27, 1963, its majority status, absent exceptional circumstances not present here, could not be impeached at least until June 27, 1964.[8]

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[8] The cases relied on by petitioner (Pet. 10–13) are distinguishable. In *Philip Carey Mfg. Co.* v. *National Labor Relations Board*, 331 F. 2d 720 (C.A. 6), certiorari denied, 379 U.S. 888, the certification year had ended and a strike had resulted in the permanent replacement of a substantial number of union supporters. The court found that the employer's refusal to bargain during the last two months of the certification year did not warrant a bargaining order "[i]n view of the lengthy good faith bargaining which has transpired, the expiration of the certification year, and the Union's loss of its majority status." 331 F. 2d at 735. In *National Labor Relations Board* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630 (C.A. 5), reversed on other grounds, 369 U.S. 404, the court relied on the facts that the union alone was responsible for the impasse in bargaining and that it had demonstrably lost its majority status. 288 F. 2d at 633, 639. The instant case, however, involves simply a refusal by the Company, six months after the certification, to execute a contract with the Union, based on nothing more than Company's assertion that its employees "may" have withdrawn from the Union (*supra*, pp. 4–5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel.
DOMINICK L. MANOLI,
Associate General Counsel.
NORTON J. COME,
Assistant General Counsel.
RICHARD S. RODIN,
Attorney,
National Labor Relations Board.

JUNE 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1968